Before the
Administrative Hearing Commission
State of Missouri

STATE BOARD OF NURSING,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 13-1571 BN
	)	
MISTY WALLACE,	)	
	)	
Respondent.	)	

DECISION

Misty Wallace is not subject to discipline because the State Board of Nursing ("the Board") failed to prove that she unlawfully possessed a controlled substance.

Procedure

On September 3, 2013, the Board filed a complaint seeking to discipline Wallace. On September 18, 2013, we served Wallace with a copy of the complaint and our notice of complaint/notice of hearing. On October 4, 2013, Wallace filed an answer. On October 17, 2014, we held a hearing on the complaint. Ian Hauptli represented the Board. Laura Spencer Garth and James C. Keanley, with the Law Offices of Kevin J. Dolley, LLC, represented Wallace. The matter became ready for our decision on January 8, 2015, the date the last written argument was due.

Findings of Fact

1. Wallace is licensed by the Board as a registered professional nurse. Wallace's license was current and active at all relevant times.

2. Wallace was employed by Poplar Bluff Regional Medical Center ("the Medical Center") in Poplar Bluff, Missouri.

3. On August 15, 2011, the Medical Center asked Wallace to submit to a drug screen, and Wallace agreed to provide a sample.

4. Wallace was told that her August 15, 2011 drug test was positive for marijuana.[1]

5. Wallace did not have a valid prescription for marijuana.

6. The Medical Center terminated Wallace's employment, but then rehired her on the condition that she sign a "never again" agreement in which she agreed to submit to random drug screens for the next two years.

7. Wallace has had random drug screenings under the agreement, and none were positive.

Conclusions of Law

We have jurisdiction to hear this case.[2] The Board has the burden of proving that Wallace has committed an act for which the law allows discipline.[3] A preponderance of the evidence is evidence showing, as a whole, that "the fact to be proved [is] more probable than not."[4] The Board argues there is cause for discipline under § 335.066.2:[5]

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[1] Marijuana is a controlled substance pursuant to § 195.017.2(4)(w). Statutory references, unless otherwise noted, are to the 2013 RSMo. Cum. Supp.

[2] Section 621.045.

[3] *See* ***Kerwin v. Mo. Dental Bd.,*** 375 S.W.3d 219, 229-30 (Mo. App. W.D. 2012) (dental licensing board demonstrates "cause" to discipline by showing preponderance of evidence).

[4] *Id.* at 230 (*quoting* ***State Bd. of Nursing v. Berry,*** 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)).

[5] RSMo. Supp. 2010. We cite to the law in effect when the conduct occurred. Section 1.170, RSMo 2000; ***Comerio v. Beatrice Foods Co.,*** 595 F. Supp. 918, 920-21 (E.D. Mo., 1984).

> 2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:
>
> (1) Use or unlawful possession of any controlled substance, as defined in chapter 195, RSMo, or alcoholic beverage to an. extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096;
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> ***
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> (5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by sections 335.011 to 335.096;
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> ***
>
> (12) Violation of any professional trust or confidence;
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> ***
>
> (14) Violation of the drug laws or rules and regulations of this state, any other state or the federal government[.]

Whether Wallace is subject to discipline on any of these counts depends on one thing – whether the Board proved that she tested positive for marijuana.

Evidence

The Board's evidence in this case consists of the affidavit of its executive director and a copy of its investigative report ("the report"). We admitted the report as a business record of the Board pursuant to § 536.070(10) over Wallace's objection.

Wallace objected at the hearing not just to the admission of the report, but to the specific content thereof, on the basis of hearsay. While we admitted the report as a business record, we sustained hearsay objections to the content of the record. Hearsay is defined as an "out-of-court

statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value."[6] "Hearsay is generally inadmissible unless it falls within a recognized exception to the rule."[7]

While the technical rules of evidence do not apply in a contested case, we must apply the fundamental rules of evidence.[8] A hearsay statement is inadmissible at hearing absent an exception to the rule barring its use.[9] The burden of proof for establishing admissibility of such evidence is on its proponent – in this case the Board.[10]

In ***State ex rel. Sure-Way Transp., Inc. v. Div. of Transp., Dep't of Economic Development***,[11] the court determined that certain records of the state agency were admissible under § 536.070(10). But the reason the content of the records could be considered was that the agency's investigator testified as to the content *without objection.* "To the extent that the investigator's testimony was hearsay, Sure-Way waived that objection by not raising it at hearing."[12] Thus, the records are *admissible* under § 536.070(10) and ***Sure-Way,*** and we admitted those records into evidence. But that does not mean the statements contained *within them* are necessarily competent evidence.

The report describes the observations of persons besides the investigator by attributing statements to them ("attributed statements"). The investigator may not relate anyone else's observations.[13] The attributed statements are hearsay, do not relate the investigator's own observations, and so are not covered under the business record exception and require their own

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[6] ***State v. Tindle***, 395 S.W.3d 56, 63 (Mo. App., S.D. 2013) (quoting ***State v. Sutherland,*** 939 S.W.2d 373, 376 (Mo. banc 1997)).

[7] ***State v. Steele***, 314 S.W.3d 845, 850 (Mo. App. W.D.2010).

[8] ***Lagud v. Kansas City Bd. of Police Comm'rs***, 136 S.W.3d 786, 792 (Mo. banc 2004).

[9] ***Jamison v. Dep't of Soc. Servs., Div. of Family Servs***., 218 S.W.3d 399, 417 (Mo. banc 2007).

[10] ***State v. Porras***, 84 S.W.3d 153, 157 (Mo. App. W.D. 2002).

[11] 836 S.W.2d 23, 25 (Mo. App. W.D. 1992).

[12] ***Id.*** at 26.

[13] ***Edgell v. Leighty***, 825 S.W.2d 325, 329 (Mo. App. S.D. 1992).

exception to be admissible. The Board cites no exception that would render the attributed statements or the written statements of other individuals admissible.

This is also true for the drug test results found in the exhibit. Laboratory reports used to prove drug possession are also "testimonial evidence" and therefore, hearsay.[14] The one exception in the Board's exhibit is Wallace's own notarized statement, which we consider to be a party admission.[15]

Cause for Discipline

The Board failed to offer witnesses or other documents authenticating its exhibits from the laboratory or hospital (which could have been offered by telephone). The Board offered no witnesses at the hearing except Wallace. When we consider only the competent evidence in the record – Wallace's written statement and her testimony at hearing – we are left with the following: Wallace took a drug test at the Medical Center, and the Medical Center told her she was being fired for testing positive for marijuana. But in her statement and her testimony, Wallace denied that she ever possessed or used marijuana.

The reference to the drug test in her written statement was, "The test result apparently indicated that I had marijuana in my system."[16] But she testified that she had not seen the drug test and was relying on what she had been told. We find this is insufficient to constitute an admission that her drug test was positive. We also accept Wallace's explanation as to why she agreed to the drug testing as a condition to her re-employment – that she wanted the position and was not afraid she would fail a drug screen. She also testified:

> Q: And so did that, if you recall, did that never again agreement contain any admission that you had, in fact, used marijuana?

[14] ***State v. March***, 216 S.W.3d 663, 666-67 (Mo. banc 2007).
[15] Ex. 1A at 37-38.
[16] *Id*. at 37.

A: No.

Q: If it had contained that would you have signed it?

A: No.

Q: Why not?

A: Because I didn't use marijuana.[17]

Because we have no competent evidence that Wallace tested positive for marijuana, we cannot apply the presumption found in § 324.041 to make a finding that she possessed the controlled substance. The Board failed to meet its burden of proof, and we find no cause for discipline under § 335.066.2(1), (5), (12), or (14).

Summary

We find no cause for discipline.

SO ORDERED on April 22, 2015.

\s\ *Sreenivasa Rao Dandamudi*
SREENIVASA RAO DANDAMUDI
Commissioner

[17] Tr. at 39.